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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 270

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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Subject Index

	Page
Grounds for rehearing	1
The basis of the decision of the court below was at no time a subject at issue. The action of the court in ignoring the record and the pre-trial memorandum and concluding that the parties and the United States District Court did not know what the case was about, and in deciding the case on an issue which it thought should have been raised, and in supporting that decision by assuming a fact contrary to the record and the pre-trial memorandum, deprived the petitioner of its day in court and violated rules of accepted and usual course of judicial proceedings	3
Conclusion	6

Table of Authorities Cited

Cases

	Pages
Hormel v. Helvering (1941) 312 US 552	4
Mercantile National Bank of Dallas, 276 Federal (2nd) 58, affirming Tax Court 30 TC 84	2, 3, 4, 5

Constitutions

Constitution of the United States:	
Fifth Amendment	2

Rules

Rules of the United States Supreme Court:	
Rule 19	2
Rule 58, Subdivision 2	6

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PETITION FOR REHEARING

Petitioner presents its Petition for a Rehearing of this court's order dated October 15, 1962 denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, and, in support thereof, respectively shows:

GROUNDS FOR REHEARING

A denial of the Petition for Writ of Certiorari leaves the Petitioner without recourse or remedy against the

effect of the decision of the United States Court of Appeals for the Ninth Circuit which, because of the unusual circumstances with respect to that decision, deprives this petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. The constitutional question herein stated was not previously presented because the petitioner was confident that the specific reasons set forth in said Petition came directly within the character of reasons which this court in Rule Nineteen of its Rules stated would be considered as sufficient to justify review, and particularly the reason with respect to the conflict between the decision of the United States Court of Appeals of the Fifth Circuit in the case of *Mercantile National Bank of Dallas*, 276 Federal (2nd) 58, affirming the Tax Court 30 TC 84 and the decision of the United States Court of Appeals for the Ninth Circuit in this case in which the conflict was acknowledged both by the United States Court of Appeals for the Ninth Circuit and by the Government in its brief in opposition to the Petition for Writ of Certiorari herein.

As further grounds for rehearing, this petitioner believes its failure to properly describe certain facts with respect to the basis of the decision of the United States Court of Appeals for the Ninth Circuit, has caused this Honorable Court to overlook features of this case which give it an importance not too apparent from the Petition for Certiorari. The case is important as hereinafter explained, not only in its direct effect upon the petitioner in depriving it of property without due process of law, and its direct effect upon the principle that laws should

be uniformly and equally applied, but also in its application of a practice by the Court below, which, if applied generally, can deprive any litigant of his property without due process of law and can so completely upset the accepted rules and course of judicial proceedings, that those litigants may never be certain of having that day in court which is guaranteed them by the Constitution of the United States.

THE BASIS OF THE DECISION OF THE COURT BELOW WAS AT NO TIME A SUBJECT AT ISSUE. THE ACTION OF THE COURT IN IGNORING THE RECORD AND THE PRE-TRIAL MEMORANDUM AND CONCLUDING THAT THE PARTIES AND THE UNITED STATES DISTRICT COURT DID NOT KNOW WHAT THE CASE WAS ABOUT, AND IN DECIDING THE CASE ON AN ISSUE WHICH IT THOUGHT SHOULD HAVE BEEN RAISED, AND IN SUPPORTING THAT DECISION BY ASSUMING A FACT CONTRARY TO THE RECORD AND THE PRE-TRIAL MEMORANDUM, DEPRIVED THE PETITIONER OF ITS DAY IN COURT AND VIOLATED RULES OF ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

In this case the United States Court of Appeals for the Ninth Circuit reached its decision, review of which is here being requested, on a basis which had to involve the following conclusions:

1. That the Tax Court of the United States, recognized by this Honorable Court as expert in Tax law, did not know what the *Mercantile National Bank of Dallas* case, 30 TC 84, a case cited in the Petition for Writ of Certiorari and identical with the one here before this court, was all about, either as to the issue involved or the question of law involved.

2. That the United States Court of Appeals for the Fifth Circuit who affirmed the Tax Court in a carefully prepared opinion in the same case, 276 Federal (2nd) 58 attached as Appendix D to the Petition for Certiorari, also did not know what the case was about, either as to the issue or the question of law involved.

3. That the taxpayer's counsel and the Government counsel in that case, and in this case, did not know what either case was all about, either as to issue or question of law involved.

4. That the United States District Court who tried this case and presided at the pre-trial proceedings did not know what this case was all about, either as to issue or question of law involved, and the Pre-Trial Memorandum and the Record should be ignored (which is a procedure in direct violation of this Court's admonition in the case of *Hormel v. Helvering* (1941) 312 US 552, at 556).

5. That even though the Government was all wrong in what it did, the real issue should have been a question which was not raised in these cases, and should have been raised, and if raised should have been decided in favor of the Government, so the Government's imposition of excess profits tax, even though on the wrong ground, should be sustained.

Can it be said that under these circumstances the petitioner in this case has had its day in Court, when at no time did it ever have the opportunity of presenting its position on the issue raised and decided by the Court below?

The Mercantile National Bank of Dallas paid no tax under the interpretation of a statute by the Tax Court of the United States and the United States Court of Appeals for the Fifth Circuit. The petitioner here has to pay over one million dollars in tax because of the interpretation of the same statute by the Court of Appeals for the Ninth Circuit who specifically acknowledged that its interpretation was exactly opposite to and in conflict with the interpretation by the Tax Court and the United States Court of Appeals for the Fifth Circuit. *Obviously there is neither equality nor uniformity of application of the law in this situation.*

During the course of the presentation of this case in the United States Court of Appeals for the Ninth Circuit, Government counsel explained that it did not apply for Certiorari in the *Mercantile National Bank of Dallas* case because without a conflict in Circuits it did not believe it could obtain Certiorari, but it was continuing to contest these cases in the hope it could bring about a conflict. Now there is a conflict and the Government pointed out in its Brief in Opposition to the Petition for Certiorari that other cases are pending. Are the Courts handling these cases going to be left with a choice of following the Fifth Circuit or the Ninth Circuit? And if they should follow the Fifth Circuit and the Government obtain Certiorari because of conflict with the Ninth Circuit what will be the position of this petitioner? If this Honorable Court should persist in refusing to review these cases, then this petitioner stands alone as a victim of discrimination. If this Honorable Court should grant Certiorari and affirm those cases, again this petitioner will stand alone as a

victim of discrimination. It is respectfully urged that this Honorable Court should review this case in the interests of Justice and to prevent substantial harm through judicial error and discrimination against the petitioner because of the errors of the United States Court of Appeals herein complained of. It is our understanding that this Court may act to avoid any such hardship or injustice.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that upon further consideration, Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
October 22, 1962.

GEORGE H. KOSTER,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I, George H. Koster, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, Subdivision 2 of the Rules of this Court.

GEORGE H. KOSTER,
Counsel for Petitioner.